

**NATIONAL MEDIATION BOARD**  
**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

BROTHERHOOD OF MAINTENANCE OF WAY	)	
EMPLOYEES DIVISION – IBT RAIL CONFERENCE	)	Case No. 290
	)	
and	)	
	)	Award No. 290
NORFOLK SOUTHERN RAILWAY COMPANY	)	
(FORMER SOUTHERN RAILWAY COMPANY)	)	

Richard K. Hanft, Chairman & Neutral Member  
D. M. Pascarella, Employee Member  
S. M. Goodspeed, Carrier Member

Hearing Date: July 24, 2019

**STATEMENT OF CLAIM:** “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s deeming that Mr. S. Walker forfeited all seniority and considering of him as resigned from the service of Norfolk Southern, as detailed in a letter dated January 20, 2017, was incorrect, wrongful and in violation of Rule 40 of the Southern Agreement as amended by the March 14, 2001 Discipline Agreement (Carrier’s File CN-MW-1-58-2 SOU).
  
2. As a consequence of the violation referred to in Part 1 above, Claimant S. Walker shall be made whole for all financial losses as a result of the violation including compensation for: (1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully removed); (2) any general lump-sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; (3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service or on overtime paid to any junior employe for work Claimant could have bid on and performed had Claimant not been removed from service; and (4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service with, finally, all notations of the removal from service removed from all Carrier records.”

FINDINGS:

Upon the whole record and all of the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

Claimant in this matter was a B & B Mechanic and Flagging Foreman on August 29, 2016 when he suffered an on-job injury and was medically withheld from service. On October 19, 2016 Claimant was released by his doctor without restriction. Claimant's Case Manager, an employee of CorVel, a third-party vendor used by Carrier to manage out-of-service medical cases, advised Claimant that she would notify the Carrier of his release to return to work.

On October 26, 2016 the Case Manager wrote to Claimant notifying him that CorVel was closing its file on him and to contact his attorney with any further questions. A copy of that letter was also sent to Carrier's Adjuster. Claimant heard nothing from the Carrier's Adjuster nor from the Carrier's Medical Department about returning to work.

On November 1, 2016 Claimant, after exhausting all his sickness benefits, went to work for the Randolph County Sherriff's Department.

On January 6, 2017, Claimant's attorney wrote to the Claims Manager from CorVel that had worked with the Claimant throughout his recovery explaining that Claimant had been ready to return to work at the Railroad in his former position and that it was the attorney's and Claimant's understanding that she had sent the information via letter to Carrier's Medical Department advising that Claimant was released to return to work and that she was closing Claimant's file. The attorney explained that Claimant had not received anything from either Carrier's Engineering or Medical Departments authorizing him to return to work and inquired as to what needed to be done to get Claimant back to work.

Claimant was thereafter advised by letter dated January 20, 2017 from Carrier's Manager of Administrative Services that:

“It has come to our attention that while you were on leave of absence from your Maintenance of Way B&B Mechanic’s position with Norfolk Southern due to sickness/injury you entered into other business and employment.

Rule 44 of the applicable Southern System Agreement provides as follows in pertinent part:

An employee who engages in other employment while on leave of absence shall, unless special permission is given by his immediate superior at time leave is granted, forfeit all seniority and rights to employment under this Agreement.

Pursuant to the provisions of the current agreement, including Rule 44 listed above, you are hereby deemed to have forfeited all seniority rights and are considered resigned from the service of Norfolk Southern.”

The Organization took exception to Carrier’s application of this self-executing rule and appeals the Carrier’s decision on the property to this Board.

It appears to the Board from the record before us that Carrier was informed by CorVel’s Case Manager on October 26, 2016 that Claimant was released for work by his treating physician and that Carrier’s Medical Case Coordinator was less than efficient in providing the information to the proper authority or that proper authority neglected its responsibility to interact with Claimant to get him back to work.

While forfeiture of seniority was a proper application of the above-referenced rule, under these circumstances, the Board agrees that the Case Manager’s negligence contributed to the delay in Claimant’s returning to work and as such, the Health Services Department was, in part, responsible for triggering the forfeiture.

The Board also recognizes that Claimant in this matter is not without fault. It should not have taken Claimant more than two months to contact the Carrier for information about his return to service. He shared a responsibility with the Carrier to return to service or be returned to service as soon as practicable.

Because both parties share responsibility for the inequity that came out of the automatic execution of this rule, the Board determines forfeiture of seniority, given the circumstances presented here, was excessive and that the appropriate remedy shall be that Claimant’s seniority shall be restored and he shall be returned to service without compensation for time out of service after being cleared to return by Carrier’s Medical Department and by filling a vacancy or by being awarded a bid on a bulletined position.

AWARD:

Claim sustained in accordance with the findings.

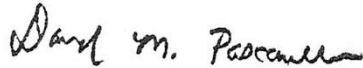


Richard K. Hanft, Chairman



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S. M. Goodspeed, Carrier Member



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D. M. Pascarella, Labor Member

Dated at Chicago, Illinois, August 26, 2019